STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,474

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Appeal of)

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INTRODUCTION

The petitioners appeal the decision by the Department of Social and Rehabilitation Services (SRS) finding them ineligible for an ongoing adoption assistance subsidy and for reimbursement of adoption expenses related to their adoption of a child in 1991. The issue is whether the petitioners' child qualifies retroactively for such assistance.

In a prior decision in this matter, dated December 18, 1995 (a copy of which is attached hereto), the Board affirmed SRS's denial of adoption assistance to the petitioners. The petitioners appealed that decision to the Vermont Supreme Court. While their appeal was pending before the Supreme Court the petitioners obtained a letter from the federal agency (U.S. Dept. of Health and Human Services [HHS]) that administers the adoption assistance program which appeared to contradict the Board's interpretation of the federal regulation upon which the Board had based its decision (see infra). The Supreme Court granted the petitioners' and SRS's request to remand the matter to the Board for further consideration in light of the recently-obtained HHS interpretation. On September 5, 1996, the Board, in turn, remanded the matter to the hearing officer to reconsider the petitioners' appeal.

The petitioners and SRS have since filed additional written arguments in the matter. The parties also submitted, by stipulation, additional written evidence, including the transcript of a deposition taken February 6, 1997, from Diane Dexter, the SRS adoption specialist and coordinator, who oversees that Department's adoption assistance program. Also submitted was the videotaped testimony of Ms. Dexter taken June 26, 1997, in the petitioners' civil court case against the Lund Home.

The following findings of fact are based on the testimony and exhibits taken in the matter at the original fair hearing on May 10, 1995, as well as the additional evidence offered by the parties following the remand of this matter to the hearing officer.

FINDINGS OF FACT

The petitioners' adopted son was born on April 30, 1991. His birth mother was fifteen years old at the time and was residing at the Lund Family Center in Burlington, Vermont. On May 13, 1991, the birth

mother signed an Authorization for Temporary Care of Infant that authorized the Lund Center to find temporary foster care for the child. The Lund Center placed the child in the petitioners' home on May 23, 1991, where he has resided ever since.

On June 10, 1991, the birth mother appeared before the Probate Court in Burlington, Vermont, and signed a voluntary Relinquishment to Agency and Surrender of Child for Adoption. On June 11, 1991, the Probate Court entered an Order terminating the birth mother's parental rights. (The contents of these documents are discussed in more detail below.) On November 30, 1991, the petitioners filed for the adoption of the child in Probate Court.

On December 9, 1991, the Lund Center submitted a final adoption report to the Probate Court. The report indicated, inter alia, that the child had had salmonella poisoning, which had been caught in time by the petitioners and successfully treated. The report indicated that despite a suspicion by the child's doctors of "seizures", the child had a normal EEG and was "friendly, alert, and thriving." The report also indicated that the birth mother had a history of drug abuse, but had reportedly stopped using drugs early in the pregnancy (although she had continued to smoke cigarettes into her eighth month). The Probate Court finalized the petitioners' adoption of the child on January 6, 1992.

At no time was the child ever in SRS custody. This was a private adoption between the petitioners and the Lund Center. The Lund Center is a private adoption agency licensed by SRS. Although children not in SRS custody and placed through private adoption agencies are also eligible for adoption assistance (see infra), at no time during the adoption proceedings were the petitioners aware of the existence of the adoption assistance program.

The evidence establishes, however, that SRS had advised the Lund Center of the existence of the program at least as of June, 1991--more than six months prior to the date the petitioners' adoption of the child was finalized. Although it appears that SRS waited several years before notifying private adoption agencies in the state of the availability of adoption assistance for private adoptions, it cannot be found that the Lund Center could not or should not have informed the petitioners of the availability of that program in time for the petitioners to have filed a timely application for assistance and for the Probate Court to have made any requisite judicial determinations (see infra) regarding the return of the child to the home of his natural mother.[(1)] Therefore, it cannot be concluded that SRS is responsible for the petitioners having been unaware of the existence of the adoption assistance program at the time of the adoption.

From the time of his adoption by the petitioners the child cried constantly and had difficulty eating and sleeping, which made caring for him demanding and stressful. Eventually, the petitioners sought the help of a psychiatrist who specializes in biological disorders and learning disabilities. In Spring of 1994, the psychiatrist diagnosed the child as having a "pervasive developmental disability" akin to autism. The psychiatrist testified, however, that except with a "blatant, severely handicapped autistic child", diagnosing this condition is difficult in infants, and it is not necessarily linked to the health of the birth mother or her behavior during pregnancy. The psychiatrist stated that given the child's early problems and the birth mother's history of drug abuse, there was certainly an increased likelihood of health and developmental problems with the child. She admitted, however, that many children with problems in infancy and maternal histories similar to this child simply "outgrow" their problems. Thus, she stated, the child's "pervasive developmental disorder" could not have been "predicted" at the time.[(2)]

In December, 1994, the petitioners applied to SRS for an ongoing adoption assistance subsidy and for the reimbursement of nonrecurring expenses related to the adoption of their child in 1991. The Department denied this application, determining that the child did not meet the eligibility criteria at the time of his adoption and that he cannot qualify for this assistance retroactively.

As noted in the Board's first Decision in this matter, as a result of the child's problems the petitioners are facing a certain future of continued financial expense and emotional stress in meeting the child's medical and developmental needs. The petitioners struck the hearing officer as remarkable for the candor and dignity with which they have pursued this matter. The petitioners admit that whatever the outcome of this matter, they are now committed to raising the child and providing him the best medical, educational, and social resources that are available to them. However, they credibly testified that had they known in advance of the financial and emotional burdens the child's problems would cause, they would not have adopted him.

The petitioners are presently in the process of pursuing legal recourse against the Lund Center for, inter alia, allegedly misrepresenting to them the medical and social history of the child's birth mother.

Through Ms. Dexter's deposition and court testimony the Department admits that had the petitioners made a timely application for assistance, and had the alleged history and circumstances of the child's birth mother been known at that time, the child would have been considered to have met two of the three criteria under the statute (see infra) to qualify for ongoing adoption assistance. Whether the child would have met the third eligibility criteria is the primary subject of the continuing dispute between the parties.

ORDER

SRS's decision regarding the petitioners' eligibility for ongoing adoption assistance is affirmed. The Department's decision regarding nonrecurring adoption assistance is reversed, and the matter is remanded to the Department to determine the amount of such assistance to which the petitioners are retroactively eligible.

REASONS

The federal statute that created the adoption assistance program, 42 U.S.C. § 673, includes the following:

Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

(1) . . .

(B) Under any adoption assistance agreement entered into by a State with parents who adopt a child with special needs, the State--

(i) shall make payments of nonrecurring adoption expenses...and

(ii) in any case where the child meets the requirements of paragraph (2), may make adoption assistance payments to such parents. . . .

(2) For purposes of paragraph (1)(B)(ii), a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative (specified in [the AFDC section] of this title) either pursuant to a voluntary placement agreement with respect to which Federal payments are provided under. . .this title or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income (SSI) benefits, or

(iii) is a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent as provided in section 675(4)(B) of this title,

(B)(i) received aid under the State plan (for AFDC) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative . . . within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

. . .

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this

chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

Federal regulations implementing the above provisions further provide:

The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party . . . .

42 C.F.R. § 1356.40(b).

The Board's initial decision in this matter was that, notwithstanding the criteria under 42 U.S.C. § 673(a)(2), the child could not be found retroactively eligible for adoption assistance because the petitioners, through no fault of SRS, had not met the requirement under 42 C.F.R. § 1356.40(b) of having a signed agreement in effect at the time of the child's adoption. As noted above, however, after the petitioners appealed this decision to the Supreme Court they obtained an interpretation from the federal agency (HHS) that when a private adoption agency (like the Lund Center in this case) fails to inform adoptive parents of the availability of adoption assistance the adoptive parents are entitled to a hearing after the finalization of the adoption to determine whether retroactively the child can be found to have met the eligibility requirements of 42 U.S.C. § 673(a)(2). Thus, the parties now agree that the case is properly before the Board again to determine whether it can be found retroactively that the petitioners' adoptive child met the requirements of 42 U.S.C. § 673(a) at the time of his adoption.[(3)]

To the uninitiated 42 U.S.C. § 673 is complex and abstruse. It sets forth requirements for two different types of adoption assistance. The first (see § [a][1][B][i]) is for "nonrecurring adoption expenses", which are designed to reimburse adoptive parents on a one-time basis for their expenses in the adoption proceedings themselves. It appears that the current rate of reimbursement is a maximum of $2,000 per family. The requirements for eligibility for this form of assistance are relatively straightforward: the child must have "special needs" as defined by the statute (see infra).

The second form of assistance (see § [a][1][B][ii]) is ongoing and open-ended, depending on the child's and the adoptive family's needs. This is the type of assistance primarily sought by the petitioners in this matter, and it will be considered first in the ensuing discussion.

Section (a)(2) of the statute sets forth three basic criteria of eligibility for ongoing adoption assistance, with the first two containing several alternatives and subalternatives. As noted above, the Department now concedes that the petitioners' adoptive child would have met two of the criteria for ongoing assistance, those set forth in sections B(ii)(II) and C.

Section B(ii)(II) provides that a child must have lived with an eligible relative and have been eligible for AFDC within six months prior to when the "adoption proceedings were initiated". As will be discussed below, establishing the precise date when the "proceedings" were initiated is crucial to the determination

of whether the child met the requirements of section A--the one in dispute. As found above, the birth mother filed the Surrender of Child for Adoption on June 10, 1991; and, as will be discussed further below, this is concluded to be the date that the "adoption proceedings were initiated".

As also found above, the child lived with the birth mother at the Lund Center from his birth until May 23, 1991, when he was placed with the petitioners. In her testimony at the petitioners' trial against the Lund Center, Ms. Dexter, the SRS adoption coordinator, acknowledged that the birth mother would have been eligible for ANFC (AFDC) if she had applied for those benefits while the child was living with her. (Apparently, however, she never did apply.) Thus, the child would have met the requirement in section B(ii)(II) that he would have been eligible for AFDC within six months prior to the date his birth mother initiated his adoption proceedings.

Section C of the statute requires that the child have "special needs", which include a determination by the state agency that he should "not be returned to the home of his parents" and that there is "a specific factor or condition"

(including, inter alia, "medical conditions") which make it "reasonable to conclude that (he) cannot be placed with adoptive parents without providing adoption assistance..."

It does not appear that the Department disputes the petitioners' allegations--discovered by them well after they had adopted the child--regarding the birth mother's history of drugs and alcohol. In her deposition and trial testimony Ms. Dexter conceded that had the mother's circumstances and medical history been known at the time of the adoption, the Department would have found that the child had special needs within the meaning of the statute. (This appears to be dispositive of whether the petitioners qualify for nonrecurring adoption assistance [see infra].)

This leaves section A under § 673(a)(2) as the main bone of contention. This section sets forth three alternative paths to eligibility, which will be considered in reverse order. The third path, subparagraph (iii), is clearly not applicable. It concerns a child of a minor parent in a "foster family home" that receives specific statutory payments on behalf of the child and his minor parent. As noted above, the birth mother, although a minor, lived at the Lund Center, which is a private facility that did not receive the requisite statutory payment for providing "foster care" to the child or his birth mother.(4)

The second path under section A, which is set forth in subparagraph (ii), is that the child be eligible for SSI.(5) The petitioners in this matter argue strenuously that the child should be found eligible under this subsection. The issue, however, is not whether the child is now eligible for SSI; it is whether it can be determined, albeit retroactively, that he would have qualified for SSI at the time of his adoption. The evidence presented by the petitioners does not support this claim.

As noted above, although the child displayed some disturbing symptoms in his first half year of life, which continued thereafter, his neurological and developmental deficits were not diagnosed until he was almost three years old--more than two years after his adoption by the petitioners.

20 C.F.R. § 416.924(a) of the federal SSI regulations provides that for infants from birth to age 1 to be eligible for SSI there must be an impairment:

"...reasonably expected to substantially reduce...your ability to...grow, develop, or mature physically,

mentally, or emotionally and, thus, to (either) attain developmental milestones at an age-appropriate rate; or...engage in age-appropriate activities of daily living...in self-care, play, and recreation, school and academics, vocational settings, peer relationships, or family life; or...acquire the skills needed to assume roles reasonably expected of adults."

Even with the hindsight of the birth mother's substance abuse problems, and the problems later diagnosed in the child, it cannot be concluded that at the time of the adoption the child could have been diagnosed as having an impairment that would have been reasonably expected to result in the above-described deficits. The child's treating psychologist testified that based on the child's early medical history, and what was later discovered about the birth mother's problems, while the child was certainly "at risk" of having neurological problems while he was still in infancy, a "pervasive developmental disorder" could not have been predicted at that time. It is, therefore, concluded that the child would not have been found eligible for SSI at the time of his adoption, even with the knowledge of the birth mother's problems and circumstances.

The last path left under section A is subparagraph (i), which reads:

. . .at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative . . . either pursuant to a voluntary placement agreement with respect to which Federal payments are provided . . . or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child. . . .

This subparagraph contains two alternatives, the second of which contains two subalternatives. The first alternative is that the child be eligible for AFDC (ANFC) "at the time adoption proceedings were initiated". From the plain language and the context of the statute as a whole, it is concluded that "adoption proceedings" mean court or equivalent legal proceedings necessary to accomplish adoption under state law. In this case, it must be concluded that such proceedings were "initiated" when the birth mother filed the Relinquishment to Agency and Surrender of Child for Adoption in Probate Court on June 10, 1991.

As noted above, prior to this filing the birth mother had, on May 23, 1991, signed an Authorization for Temporary Care of Infant with the Lund Center; and on May 23, 1991, the Lund Center had placed the child in the home of the petitioners. A basic requirement of AFDC (ANFC) is that an eligible child must be living in the home of an eligible "relative". See 42 U.S.C. § 606(a) and 33 V.S.A. § 1103. In this case, in June, 1991, when the adoption proceedings were initiated, the child was living with the petitioners, not with any "relative". Therefore, it cannot be concluded, even in retrospect, that the first alternative under section A would have been met.

As noted above, the second alternative under section A contains two subalternatives, the first of which is not in dispute. The petitioners do not maintain that "Federal payments" were provided to either the Lund Center or the petitioners as a result of the birth mother's "voluntary placement agreement"--i.e., her "Authorization" with the Lund Center or her "Relinquishment" in the Probate Court.

This leaves as a final path to eligibility under section A whether the "removal" of the child from the birth mother's home was "as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of the child". In the hearing officer's view, this is the most problematic section of the statute to interpret.

The petitioners point out that in her Relinquishment to the Lund Center filed in Probate Court on June 10, 1991, the birth mother stated in part:

After due consideration and believing that the best interests of my said child will be promoted by being placed in a foster home for adoption, I do hereby voluntarily and unconditionally surrender the said child to the Lund Family Center for the purpose of placement in a foster home for adoption, and to take any and all other measures, which, in the judgement of said Lund Family Center, may be for the best interests of my said child.

The next day, on June 11, 1991, the Probate Court, acknowledging, inter alia, the birth mother's relinquishment, entered an Order approving "said surrender and relinquishment" and terminating the birth mother's parental rights to the child. The Probate Court's Order contained no findings or discussion of the child's best interest or of the birth mother's home as a suitable one for the child.

The petitioners argue that the Probate Court's Order, in referring to the birth mother's relinquishment, constituted "a judicial determination to the effect that continuation in the (birth mother's) home would be contrary to the welfare of the child". The Department argues that the Probate Court Order is insufficient to meet the requirements of the statute, especially since Vermont law at the time did not set forth a "best interest", or any other, standard for granting adoption petitions.

A published federal (HHS) agency interpretation of the above judicial-determination provision supports the Department's position. The interpretation, known as PIQ

86-02, states that for adoption assistance eligibility the court order must contain a "statement" either that continuation in the home is contrary to the child's welfare or that placement in another home is in the child's best interest. Furthermore, the interpretation states that even if the court order makes reference to a "correctly worded petition" it is not sufficient unless the court order "expressly adopts the specific relevant language of the petition and makes clear that a judicial determination has been made" to that effect. There can be little question in this matter that the Probate Court Order does not meet the standard set forth in the above federal agency interpretation.(6)

In her court testimony, Ms. Dexter explained that to satisfy the requirement that there be specific language as to the best interests of the child, the Department, when it is a party to adoption proceedings, specifically requests such findings, and that the courts usually and routinely grant such requests. In this case, SRS does not appear to dispute that the Probate Court probably would have made such findings if it had be asked to do so by the Lund Center. Unfortunately, the Lund Center didn't ask. The petitioners argue, however, that based on the uncontroverted evidence as to the birth mother's circumstances the Board should make this determination in lieu of actual court findings to that effect.

Based on the evidence now available, it would probably not be unreasonable for the Board to make such findings. However, as was discussed in the Board's original Decision in this matter, the federal agency (HHS) has taken a strict position with states that the absence of a specific court determination as to best interests of the child cannot be cured retroactively. Moreover, this position has been upheld by the one federal court that has been asked to consider it. Indeed, as pointed out by SRS, it was held that a nunc pro tunc determination regarding a birth mother's circumstances, even by the court that had original jurisdiction to make it, is insufficient to meet the requirements of the adoption assistance statute that such determinations be made at the time of the actual adoption. Harvey v. Shalala, 824 F. Supp. 186 (D.Neb. 1993).

Thus, it appears that the petitioners have been harmed by the Lund Center not only in its apparent failure to disclose to them the birth mother's history of substance abuse and its failure to inform the petitioners of the existence of the adoption assistance program, but also by its failure to request and obtain court findings that might have allowed the petitioners to be found eligible for that assistance retroactively. Sympathy with the petitioners' plight notwithstanding, however, it appears that the Department's decision in this case regarding the petitioners' eligibility for ongoing adoption assistance is in accord with applicable law. Therefore, the board is bound to affirm that decision. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 17.

This leaves the question of the petitioners' retroactive eligibility for nonrecurring adoption assistance. As noted above, SRS, through Ms. Dexter's testimony, admitted that, based on the petitioners' allegations, the child would have been considered to have had "special needs" within the meaning of 42 U.S.C. § 673(c) (see supra). This appears to be the only requirement for eligibility for nonrecurring adoption assistance set forth in 42 U.S.C. § 673(a)(1)(B)(i) (supra). Therefore, assuming that the Department accepts the petitioners' allegations regarding the birth mother's prenatal history, the matter is remanded to the Department to determine the amount of such assistance for which the petitioner's would have qualified.(7)

# # #

1. Nobody from the Lund Center testified at the hearing.

2. See 5/10/95 Fair Hearing Transcript, pp. 26 and 44.

3. Cases and federal agency opinions were cited in the Board's original decision (see p. 8) that held that adoptive parents have a right to a hearing to determine post-adoption retroactive eligibility in cases where the state agency had failed to inform them of the availability of adoption assistance. In a footnote (see P. 9) the Board indicated that if the petitioners could bring the case back to fair hearing if it could be shown that the federal agency disagreed with the Board's conclusion that these holdings did not extend to cases (such as this) in which the failure to inform the parents was the fault of a third party.

4. The receipt of foster care payments also satisfies one of the alternative criteria under section B. See 42 U.S.C. § 673(a)(2)(B)(iii).

5. Eligibility for SSI also satisfies one of the alternate criteria under section B. See 42 U.S.C. § 673(a)(2)(B)(iii).

6. The petitioners cite an agency interpretation of similar language in the AFDC statute that sets forth a less stringent test. See PIQ 75-21. They admit, however, that this interpretation concerns eligibility for AFDC and that it predated the passage of the adoption assistance provisions and the agency interpretation set forth in PIQ 86-02.

7. If the Department does not accept the petitioners' allegations, it is directed to make its own findings in that regard and to issue a decision in light of those findings. The petitioners retain the right to further appeal to the Board to contest any negative decision by the Department based on those findings.